

FEDERAL CIRCUIT COURT OF AUSTRALIA

*KLYCHEV & ORS v MINISTER FOR
IMMIGRATION & ANOR*

[2016] FCCA 1211

Catchwords:

MIGRATION – Partner visa (Class UK) – review of decision of Migration Review Tribunal – whether the Tribunal considered all of the applicant’s claims concerning the relationship with the spouse under reg.1.15A of the *Migration Regulations 1994* (Cth) – whether the Tribunal failed to take into account the circumstances of the relationship – whether the Tribunal erred in finding that there was no relationship between the applicant and spouse – whether the Tribunal denied the applicant procedural fairness in failing to adjourn the hearing – reasonable apprehension of bias – no jurisdictional error – application dismissed.

Legislation:

Migration Act 1958 (Cth), s.5F

Migration Regulations 1994 (Cth), reg.1.15A, pt.820.211 of sch.2

Cases cited:

British American Tobacco Australia Services Ltd v Laurie (2011) 242 CLR 283; [2011] HCA 2

Concrete Pty Limited v Parramatta Design & Developments Pty Ltd (2006) 229 CLR 577; [2006] HCA 55

Ebner v Official Trustee in Bankruptcy (2000) 205 CLR 337; [2000] HCA 63

Kaur v Minister for Immigration & Border Protection [2014] FCA 1251

Michael Wilson & Partners Ltd v Nicholls (2011) 244 CLR 427; [2011] HCA 48

Minister for Immigration & Border Protection v Truong [2016] FCAFC 54

Minister for Immigration & Citizenship v Li (2013) 249 CLR 332; [2013] HCA 18

Minister for Immigration & Citizenship v SZMDS (2010) 240 CLR 611; [2010] HCA 16

Minister for Immigration & Citizenship v Zaouk (2007) 159 FCR 152; [2007] FCAFC 47

MZZLO v Minister for Immigration & Border Protection (No 2) [2016] FCA 356

SZRUI v Minister for Immigration, Multicultural Affairs & Citizenship [2013] FCAFC 80

Xiang Sheng Li v Refugee Review Tribunal (1994) 36 ALD 273

First Applicant:	SAGYNBEK KLYCHEV
Second Applicant:	NAZIRA KLYCHEVA
Third Applicant:	INDIRA KLYCHEVA
Fourth Applicant:	RUSLAN KLYCHEV
First Respondent:	MINISTER FOR IMMIGRATION & BORDER PROTECTION
Second Respondent:	MIGRATION REVIEW TRIBUNAL
File Number:	SYG 1533 of 2015
Judgment of:	Judge Smith
Hearing date:	2 May 2016
Date of Last Submission:	2 May 2016
Delivered at:	Sydney
Delivered on:	27 May 2016

REPRESENTATION

Counsel for the Applicant:	Mr G. Underwood
Solicitors for the Applicant:	Doyle Wilson Solicitors
Counsel for the First Respondent:	Ms R. Graycar
Solicitors for the Respondents:	Sparke Helmore

ORDERS

- (1) The application be dismissed.
- (i)

FEDERAL CIRCUIT COURT

OF AUSTRALIA

AT SYDNEY

SYG 1533 of 2015

SAGYNBEK KLYCHEV

First Applicant

NAZIRA KLYCHEVA

Second Applicant

INDIRA KLYCHEVA

Third Applicant

RUSLAN KLYCHEV

Fourth Applicant

And

MINISTER FOR IMMIGRATION & BORDER PROTECTION

First Respondent

MIGRATION REVIEW TRIBUNAL

Second Respondent

REASONS FOR JUDGMENT

1. The first applicant is a citizen of Kyrgyzstan who arrived in Australia on 18 November 2010 on a Prospective Marriage visa (Subclass 300). He was granted that visa on the basis of his intention to marry an Australian citizen (the sponsor). The applicant's three children came

with him to Australia. They are the second, third and fourth applicants. Although they too applied for visas and were applicants before the Migration Review Tribunal¹, they relied on the success of their father's application. For that reason, it is convenient to refer to the first applicant as the applicant.

2. On 20 May 2011 the applicant applied for a Partner (Temporary) (Class UK) visa. The criteria for the grant of that visa were contained in pt.820 of sch.2 to the *Migration Regulations 1994* (Cth). The applicant had married the sponsor on 25 December 2010 but his relationship with the sponsor had ceased by the time of the visa application. In those circumstances, the relevant criterion was:

820.211(8) *An applicant meets the requirements of this subclause if:*

- (a) *the applicant is the holder of a Subclass 300 (Prospective Marriage) visa; and*
- (b) *the applicant has married the sponsoring partner under a marriage that is recognised as valid for the purposes of the Act; and*
- (c) *the relationship between the applicant and the sponsoring partner has ceased; and*
- (d) *any 1 or more of the following:*
 - (i) *the applicant;*
 - (ii) *a member of the family unit of the applicant who has made a combined application with the applicant;*
 - (iii) *a dependent child of the sponsoring partner or of the applicant or of both of them;*

has suffered family violence committed by the sponsoring partner.

3. The relevant facts can be stated briefly.

¹ As it was then known. On 1 July 2015 it became the Administrative Appeals Tribunal: *Tribunals Amalgamation Act 2015* (Cth).

Background

4. As already noted, the applicant arrived in Australia on 18 November 2010. He said that he and his three children lived with the sponsor and her son in a one-bedroom unit for a week before they all moved out to a house in Auburn. The applicant married the sponsor on 25 December 2010. On 10 February 2011 the sponsor left Australia and did not return until February 2014. The applicant's children applied for an apprehended domestic violence order against the sponsor. That order was made by the Local Court on 25 February 2011.

5. The events leading to the apprehended domestic violence order were described by the applicant in a statement to the Department as follows:

My three children were subjected to physical attacks from the part of my wife ... since late January 2011. They were often threatened to be beaten, were pushed and verbally abused regularly since that time. On 6 February 2011 my youngest son and my daughters were beaten by (the sponsor) and suffered sustainable injuries.

Having no strenght to tolerate that my daughter called the police. After that incident me and my children moved from (the sponsor) to avoid further beatings and abuses.

(Errors in original)

6. On 21 December 2011 a delegate of the Minister made a decision to refuse to grant the applicant a visa on the basis that he had not been in a genuine and continuing relationship with the sponsor.
7. The applicant applied to the Tribunal for review of the delegate's decision. On 8 May 2015 the Tribunal affirmed the decision of the delegate. Like the delegate, the Tribunal was not satisfied that the applicant and the sponsor had been in a genuine relationship. The applicant now seeks judicial review of the Tribunal's decision.
8. Before turning to consider the grounds of the application it may be noted that there was no dispute that both the delegate and the Tribunal were correct to deal with the application before them by considering the genuineness of the relationship. Although the criterion in cl.820.211(8) does not expressly refer to a genuine relationship, in its context, the "relationship" which must have ceased (sub-cl.820.211(8))

(c)) must fall within the definition of spouse in s.5F of the *Migration Act 1958* (Cth): *Minister for Immigration & Citizenship v Zaouk* (2007) 159 FCR 152; FCAFC 47 at [16]. Further, unless there is such a relationship, there is no utility in the decision maker determining whether or not there has been a relevant family violence: *Kaur v Minister for Immigration & Border Protection* [2014] FCA 1251 at [44] (Murphy J) cited in *Minister for Immigration & Border Protection v Truong* [2016] FCAFC 54 at [46].

9. The first three grounds of the application concern the way in which the Tribunal addressed the question of the genuineness of the relationship between the applicant and the sponsor. In essence, these grounds proceed on a misunderstanding of the requirements of the Act and Regulations concerning the determination of whether or not a relationship is genuine. In order to understand why that is so, it is first necessary to set out the relevant provisions. It will then be necessary to consider the way in which the Tribunal addressed the evidence before it in light of those provisions.

10. Section 5F of the Act provides:

- (1) *For the purposes of this Act, a person is the **spouse** of another person if, under subsection (2), the 2 persons are in a married relationship.*
- (2) *For the purposes of subsection (1), persons are in a **married relationship** if:*
 - (a) *they are married to each other under a marriage that is valid for the purposes of this Act; and*
 - (b) *they have a mutual commitment to a shared life as husband and wife to the exclusion of all others; and*
 - (c) *the relationship between them is genuine and continuing; and*
 - (d) *they:*
 - (i) *live together; or*
 - (ii) *do not live separately and apart on a permanent basis.*
- (3) *The regulations may make provision in relation to the determination of whether one or more of the conditions in*

paragraphs (2)(a), (b), (c) and (d) exist. The regulations may make different provision in relation to the determination for different purposes whether one or more of those conditions exist.

11. (Emphasis in original)

12. Regulation 1.15A of the Regulations includes the following provisions for determining whether two persons are in a spousal relationship with each other:

(1) *For subsection 5F(3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F(2)(a), (b), (c) and (d) of the Act exist.*

(2) *If the Minister is considering an application for:*

...

(d) *a Partner (Temporary) (Class UK) visa;*

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

(3) *The matters for subregulation (2) are:*

(a) *the financial aspects of the relationship, including:*

(i) *any joint ownership of real estate or other major assets; and*

(ii) *any joint liabilities; and*

(iii) *the extent of any pooling of financial resources, especially in relation to major financial commitments; and*

(iv) *whether one person in the relationship owes any legal obligation in respect of the other; and*

(v) *the basis of any sharing of day-to-day household expenses; and*

(b) *the nature of the household, including:*

(i) *any joint responsibility for the care and support of children; and*

- (ii) *the living arrangements of the persons; and*
- (iii) *any sharing of the responsibility for housework; and*
- (c) *the social aspects of the relationship, including:*
 - (i) *whether the persons represent themselves to other people as being married to each other; and*
 - (ii) *the opinion of the persons' friends and acquaintances about the nature of the relationship; and*
 - (iii) *any basis on which the persons plan and undertake joint social activities; and*
- (d) *the nature of the persons' commitment to each other, including:*
 - (i) *the duration of the relationship; and*
 - (ii) *the length of time during which the persons have lived together; and*
 - (iii) *the degree of companionship and emotional support that the persons draw from each other; and*
 - (iv) *whether the persons see the relationship as a long-term one.*

...

13. The Tribunal's reasons closely followed the structure of these legislative provisions. First, the Tribunal considered whether, and accepted that the applicant and the sponsor were validly married: sub-s.5F(2)(a). Next, it considered whether the other requirements for a spouse relationship were met. In this respect it addressed each of the matters in reg.1.15A(3), namely, the financial aspects of the relationship, nature of the household, social aspects of the relationship and the nature of the commitment to each other. Finally, it considered other relevant considerations that arose on the evidence. In its conclusions, the Tribunal said:

[74] The tribunal has considered all the evidence both individually and cumulatively. Although the applicants and the applicant's friends have provided statements in support of the application, there is little documentary or independent

information which provides support to the claims made by the applicant. The only photos provided of the applicant and the sponsor together was on the day of their wedding. This is despite it being claimed that there were other photos taken, but these have all now been destroyed. There is no documentation which would indicate the sponsor ever notified any organisation including Centrelink, that she was living with the applicant in his home in Auburn. The very abrupt end of the claimed relationship after it was claimed that it had previously been positive and harmonious also calls into question the genuineness of that relationship.

[75] When balancing all the evidence before the tribunal, the tribunal is not satisfied that the weight of evidence indicates that the parties were at any time in a genuine relationship.

Consideration

Ground 1

14. The first ground of the application is that the Tribunal did not deal with each of the matters required by reg.1.15A(2). In his written submissions the applicant asserts that the Tribunal failed to deal with the following matters:
 - a) the financial aspects of the relationship: joint ownership of real estate or other major assets, and pooling of financial resources;
 - b) nature of the household: joint responsibility for the care and support of children, and sharing of the responsibility of house work;
 - c) social aspects of the relationship: the basis on which the persons plan and undertake joint social activities; and
 - d) commitment to each other: the length of time during which the persons had lived together.
15. The applicant's submission was that there was no evidence before the Tribunal in respect of each of these matters. However, if that was the case, there was no obligation on the Tribunal to consider the matter. That is because each of the considerations in reg.1.15A(3) is qualified by the word "any". This means that if there is no evidence of a particular matter, the Tribunal does not have to take it into account.

Counsel for the applicant ultimately accepted that proposition. It is fatal to the first ground.

Ground 2

16. The second ground is essentially the same as the first ground and must be rejected for the same reason.

Ground 3

17. The third ground is that the Tribunal failed to take into account evidence that was credible and relevant concerning “all of the circumstances of the relationship”.

18. In respect of the financial aspects of the relationship, the applicant says that the Tribunal failed to take into account the following evidence:

- a) that the applicant and the spouse wanted to open a joint bank account but did not have time;
- b) the applicant and spouse shared the unit in Auburn and the tenancy was in his name alone, rented privately from a Chinese lady;
- c) the spouse was receiving a Centrelink pension; and
- d) the applicant was in paid employment.

19. There are two difficulties with this submission. First, none of this evidence of itself concerned the financial aspects of the relationship. The fact that two people share a unit is neither financial nor necessarily indicative of a relationship. Secondly, the Tribunal was clearly aware of and considered each of the matters set out above. It expressly referred to the applicant’s evidence concerning the Chinese landlord (at [15]), accepted that the sponsor was receiving Centrelink benefits and that the applicant was employed (at [46]), and referred to the applicant’s evidence about the intention to open a joint bank account (at [46]).

20. In respect of the consideration of the nature of the household, the applicant asserts that the Tribunal failed to consider the following evidence:

- a) that the applicant lived with the spouse when they first arrived in Australia at Chester Hill for 12 weeks;
- b) the spouse had belongings in the home until she moved out;
- c) the applicant leased a unit in Auburn one week after arriving in Australia and the landlord was Chinese;
- d) the applicant first lived at Chester Hill;
- e) the spouse's son collected her belongings a couple of days after the domestic violence incident;
- f) the applicant's son gave evidence of living arrangements;
- g) the applicant's son gave evidence that the spouse took her clothes with her when she left;
- h) the applicant's son gave evidence of an assault;
- i) an apprehended violence order was taken out; and
- j) evidence of assault.

21. The difficulty with this argument is that the Tribunal did not believe that the applicant and sponsor did share a household in Australia, or that they were ever living together in the Auburn property as claimed by the applicant: (at [54]). The Tribunal gave a number of reasons for this including the fact that the sponsor departed Australia for a three-year period on 10 February 2011 without apparently taking any clothes or other essentials that she would have left at her home having established a household with the applicant: (at [51]). In my view, the Tribunal's conclusion was open on the material before it. In light of that, the applicant's argument is better understood as being that, in light of the other evidence listed above the Tribunal ought to have made a different finding. That submission only goes to the merits of the Tribunal's findings and as such is outside the scope of judicial review.

22. In respect of the social aspects of the relationship the applicant argues that the Tribunal failed to consider the following evidence:

- a) *friends visited the [applicant] and spouse and spent time with each other;*

- b) *friend had photos but changed phones;*
- c) *friend visited home many times as lived near each other;*
- d) *friends at wedding, friends in community help each other;*
- e) *friends visited the [applicant] and spouse in their home;*
- f) *[one of the friends] knew [the spouse] since 2000;*
- g) *the [applicant] and spouse went to the Opera house and city;*
- h) *the [applicant] did not have photos of social activities;*
- i) *the [applicant] and spouse set out social activities.*

23. The Tribunal considered the evidence relating to the social aspects of the relationship at [55] to [59] of its reasons. Further, after again referring to the evidence, it said the following:

[69] The close-knit nature of the Kyrgyzstan community in Sydney calls into question the impartiality of the information provided by these witnesses. Although their evidence did support the claims of the applicant being in a genuine relationship with the sponsor, this must be balanced against the lack of any documentary or other information which would support those claims. It must also be balanced against the other information which would indicate that the parties were not in a genuine relationship at any time.

24. That consideration shows that, contrary to the applicant's assertion, the Tribunal did consider all of the evidence referred to above.
25. In respect of the nature of the commitment to each other, the applicant argued that the Tribunal failed to consider the fact that he lived with the spouse in Chester Hill and Auburn and that the spouse had mental problems and had been a patient at the Cumberland Hospital. There is no question that the Tribunal did consider these matters. It rejected the first of them and considered the fact that the applicant had been unaware of the sponsor's apparent mental condition was inconsistent with the claim that he had been in a relationship with her since November 2006 and had been committed to that relationship since January 2007: [66] and [67].

26. For those reasons the third ground is rejected.

Ground 4

27. The fourth ground is that the Tribunal's finding that there was no relationship was irrational, illogical and not based upon findings or inferences of fact supported by logical grounds. The applicant's written submissions in support of this ground were:

- a) the following inferences could reasonably have been made:
 - i) the spouse was suffering from a mental illness; a friend visited the spouse at Cumberland Hospital; this was a cause of the breakdown of the relationship which existed before the incident;
 - ii) the applicant gave evidence that he went to the police after the incident with the children; his children were at the police station;
 - iii) the applicant did not see the spouse again after meeting her outside the Auburn flat the day after the incident;
 - iv) the spouse left Australia for three years because of her mental condition; and
 - v) an anonymous contact to the Department does not logically mean that the relationship is contrived.
- b) On the evidence before the Tribunal, it was open to it to find that there was a relationship.

28. Leaving aside the matter in sub-para.(a)(v) above, the submissions amount to no more than an attack on the merits of the Tribunal's decision and are thus outside the proper scope of judicial review. The matter in sub-para.(a)(v) did not assist the applicant because the Tribunal did not place any weight on the anonymous report that the relationship between the sponsor and the applicant was contrived: [65].

29. In oral submissions, counsel for the applicant argued that on the evidence before it, the Tribunal could not arrive at the conclusion that the relationship between the applicant and the sponsor was not genuine.

I reject that submission. Even if it were the case, which it was not, that the Tribunal accepted that the applicant had lived with the spouse in Australia as claimed, the mere fact that the spouse left Australia on 10 February 2011 and did not return for 3 years when the applicant had only been in Australia for 1½ months was, of itself, sufficient to justify the conclusion that there had never been a genuine relationship between them. Absent some compelling (and accepted) explanation, a newly reunited and recently married couple is unlikely to separate so quickly and for so long. There was no such explanation in this case. In light of that, it cannot be said that the Tribunal's decision was not one at which no reasonable person could have arrived on the material before the Tribunal: *Minister for Immigration & Citizenship v SZMDS* (2010) 240 CLR 611; [2010] HCA 16 at [130] – [133] (Crennan and Bell JJ).

30. At the hearing a further point arose under this ground. At [49] of its reasons, the Tribunal stated:

*Apart from the statements made by the applicant and his witnesses, there is no further information which would substantiate these claims. **There is no documentation to show that the sponsor had notified any authorities that she was now living at the address in Auburn.** There is no correspondence or any other documentation which was sent to the sponsor at that address.*

31. (Emphasis added)

32. In support of the visa application the applicant had sent the Department a copy of the marriage certificate issued on 30 December 2010 by the Registry of Births, Deaths and Marriages in Sydney. In that document the address of the sponsor was given as the unit in Auburn to which the applicant said they had all moved one week after having arrived in Australia. That certificate was before the Tribunal.
33. On one view, that certificate might be considered to be evidence that the sponsor had notified an authority that she had moved into the unit in Auburn. If that were the case then, depending upon the meaning of [49] of the Tribunal's reasons, the Tribunal may have made a finding that was not open on the evidence.

34. In my view, on its proper understanding [49] of the Tribunal's reasons sits comfortably with the marriage certificate. In light of the reference to correspondence in the last sentence of that paragraph as well as what is stated at [74] later in its reasons, what the Tribunal was considering was a notification of change of address. At [74] the Tribunal said:

...

There is no documentation which would indicate the sponsor ever notified any organisation, including Centrelink, that she was living with the applicant in his home in Auburn.

...

35. What was important to the Tribunal was not that the sponsor had not told anybody about an address in Auburn, but rather, about a change of address. The marriage certificate did not indicate any change of address. For that reason, [49] of the Tribunal's reasons does not reveal any jurisdictional error.

Ground 5

36. The fifth ground in the application is a denial of procedural fairness. There are two aspects to this ground: first, the failure of the Tribunal to adjourn the hearing; and secondly, a reasonable apprehension of bias. Both aspects rely upon the fact that, during the hearing, the Tribunal expressed some frustration at the applicant's migration agent because he had brought along a number of witnesses without having provided the Tribunal with written statements by those witnesses. The relevant extract of the transcript is as follows:

HS²: *I'd like to ask your agent why has nothing else being (sic) given? You've got a number of witnesses there. Why hadn't they provided statements or something like that? I would have thought that that would have been sensible, helpful, practical or something that any decent agent would have done beforehand. It seems to be that the hearing's going to last a long time now because you haven't done that.*

² Tribunal member

Agent: Yes I know I've spoken to these people and the witnesses, and they prefer to come here and give evidence.

HS: Why haven't they given statements beforehand which might have given me some ideas to what they're going to be talking about?

Agent: I apologize for these [inaudible 00:04:49].

HS: You don't apologize. You write to me on whatever day it was. Sent by fax on the 24th of April and we're going to send some more people. You haven't provided anything. Why not? Why isn't this case prepared?

Agent: [inaudible 00:05:11].

HS: Why didn't you say? You should provide a statement first and get what evidence. Do you know what they're going to say?

Agent: [inaudible 00:05:20] I'm sorry

HS: Well why didn't you provide a statement?

Agent: It's my fault.

HS: It's ridiculous. Why do agents treat the tribunal in this way? Can you explain that to me?

Agent: There is no proper explanation [inaudible 00:05:40]. Please accept my apology.

HS: It's ridiculous. I'm expressing some frustration at your agent.

Interpreter: [Russian 00:05:47].

HS: Because I don't know why there has been no information provided to me prior to this hearing about your case.

Interpreter: [Russian 00:05:59].

HS: When I listed the matter for hearing, I specifically asked the documents to be provided at least seven days prior to the hearing.

Interpreter: [Russian 00:06:10].

HS: The fact that been provided makes me frustrated.

Interpreter: [Russian 00:06:24]

HS: Particularly when you turn up here with other witnesses, obviously spoken to your agent about what evidence they're going to give?

Interpreter: [Russian 00:06:38]

HS: Now, that makes me frustrated with your agent.

Interpreter: [Russian 00:06:47].

HS: I don't know why he hasn't done his job properly.

Interpreter: [Russian 00:06:56]

HS: I can assure you however, that it's not going to affect how I'm going to be assessing your claim.

37. The recording of this part of the hearing was played in Court. The recording revealed, consistently with the transcript, that the Tribunal was certainly frustrated by the agent's failure to provide written statements prior to the hearing. With the consent of the parties, I also listened to the rest of the recording of the hearing in chambers.
38. Although the first aspect of the ground was framed by reference to denial of procedural fairness, the applicant's written submissions referred to authorities such as *Minister for Immigration & Citizenship v Li* (2013) 249 CLR 332; [2013] HCA 18 concerning the unreasonable failure to exercise a discretionary power.
39. The first difficulty facing the applicant in this ground, whichever way it is expressed, is that neither the applicant nor his agent applied for an adjournment of the hearing. That is not necessarily fatal to an argument that there has been a denial of procedural fairness (see, for example *Xiang Sheng Li v Refugee Review Tribunal* (1994) 36 ALD 273 (Moore J)), however, when an applicant is represented at the hearing it does undermine any obligation by the Tribunal even to consider an adjournment.

40. The second difficulty is that there was no suggestion by the applicant that an adjournment would have achieved anything. While the Tribunal was of the view that the agent was not prepared for the hearing, that was limited to the preparation of written statements by the witnesses. Those witnesses gave evidence at the hearing. There is nothing to show that they were prevented, for lack of time or any other reason, from saying in evidence everything that they had to say in support of the applicant's application for review. There was, in short, no practical unfairness brought about by the fact that the Tribunal proceeded with the hearing.
41. Further, for essentially the same reasons, there was nothing unreasonable in the Tribunal's failure to adjourn the hearing. There was no issue critical to the review that might have been more effectively dealt with had there been an adjournment, and there was no cogent or any other argument as to why there should be an adjournment.
42. As to the allegation of the apprehension of bias, the question is whether a fair-minded lay observer might reasonably apprehend that the Tribunal might not bring an impartial and unprejudiced mind to the resolution of the question the Tribunal is required to decide: *Concrete Pty Limited v Parramatta Design & Developments Pty Ltd* (2006) 229 CLR 577; [2006] HCA 55; *British American Tobacco Australia Services Ltd v Laurie* (2011) 242 CLR 283; [2011] HCA 2. That test requires the articulation of the logical connection between the conduct or matter relied on and the feared deviation from the course of deciding the case on its merits: *Michael Wilson & Partners Ltd v Nicholls* (2011) 244 CLR 427; [2011] HCA 48 at [63] ("*Michael Wilson & Partners Ltd*") citing *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337; [2000] HCA 63 at 345 [8].
43. In this case the applicant relied upon the tone of the Tribunal member at the hearing which, he said, revealed an aggressive approach and attitude towards the applicant which, given the applicant's cultural background, the applicant misconstrued and engaged in "gratuitous concurrence with the Tribunal" in order to avoid conflict. Not only does this submission confuse the test for a reasonable apprehension of bias by the inclusion of subjective matters, but the assertion upon which it is based (that there was aggression shown by the Tribunal towards the applicant) is unfounded. The recording of the hearing

reveals that, with the exception of one or two sentences spoken to the agent and not to the applicant, the Tribunal spoke in a moderate tone of voice, was never harsh or aggressive and gave no indication that it was either unwilling or unable to bring an impartial mind to the consideration of the review.

44. Insofar as the Tribunal revealed frustration with the agent, that frustration was limited to the effect of the agent's conduct on the Tribunal's ability to properly prepare for the hearing. Unlike the circumstances in *MZZLO v Minister for Immigration & Border Protection (No 2)* [2016] FCA 356 there was no direct attack on the agent which resulted in, or could be seen possibly to result in, the rejection of any of the evidence relied upon by the applicant.
45. To the extent that the Tribunal asked a number of questions of the applicant that suggested it might not accept the applicant's evidence, no reasonable apprehension of bias is established by its questions. It must be borne in mind that the statutory context in which the Tribunal operates requires it, in the absence of a contradictor, to give applicants an indication of the issues that arise on the review: see for example *SZRUI v Minister for Immigration, Multicultural Affairs & Citizenship* [2013] FCAFC 80.
46. At one point, counsel for the applicant relied upon a number of passages in the Tribunal's reasons in support of the allegation of an apprehension of bias. In doing so, however, he expressly eschewed any reliance upon actual bias. In those circumstances, reliance upon the Tribunal's reasons was misplaced. As the reasons disclose what the Tribunal eventually found at the end of the process of review, they cannot assist in the determination of whether or not there was a reasonable apprehension of bias and, indeed, reliance on them wrongly imports a subjective element into the inquiry: *Michael Wilson & Partners Ltd* at [33], [67].
47. For those reasons the fifth ground is rejected.

Conclusion

48. There is no jurisdictional error affecting the Tribunal's decision. The application must be dismissed.

I certify that the preceding forty-six (46) paragraphs are a true copy of the reasons for judgment of Judge Smith

Date: 27 May 2016